Filed 12/22/08 In re M.C. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re M.C. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. C.C., Defendant and Appellant.	G040573 (Super. Ct. No. DP015162 & DP015163) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Dennis Keough, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded.

Grace Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen and Aurelio Torre, Jr., Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minors.

* * *

C.C. appeals from a juvenile court order summarily denying his Welfare and Institutions Code[1] section 388 petition. In that petition, C.C. sought an order setting aside the court's prior jurisdiction and disposition orders concerning his two daughters, arguing that he had been given no opportunity to challenge the orders when originally sought – since he was not actually notified of the proceedings until after the orders had been issued – and claiming he had new evidence suggesting that the factual allegations supporting the orders were untrue. The court denied the petition on two grounds; first, because it was untimely, and second because it failed to state a prima facie case for a change in the prior orders.

We reverse the summary denial. In concluding that C.C.'s petition was untimely, the court incorrectly relied upon cases which merely analyze a parent's challenge to the sufficiency of notice given to him or her. Such a challenge is generally waived by the parent's appearance and participation in the proceedings. But C.C.'s challenge is more significant than that; he is arguing the court's jurisdictional and dispositional orders are inappropriate, based upon factual information he had no opportunity to present at that earlier hearing, plus new evidence developed since that time. Such a challenge, made pursuant to section 388, is always "timely" if the facts alleged suggest that a change in the prior order may be appropriate and in the children's *current* best interests. A parent's participation in the proceedings during the interim between the initial order and the section 388 petition is simply irrelevant.

Nor can we agree the petition failed to state a prima facie case. Assuming the truth of the evidence submitted by C.C. in support of his petition – as the court is required to do in assessing whether the prima facie standard has been met – C.C. has

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

demonstrated that many of the factual allegations supporting jurisdiction (primarily concerning his alleged physical abuse of his daughters) are untrue, and were manufactured by his daughters' mother as part of a campaign to marginalize his role in their lives. Even assuming that state of facts would not warrant an outright reversal of the jurisdictional order itself (and we express no opinion on that issue), it clearly suggests the court should reconsider its dispositional order granting full custody to the mother.

The order is consequently reversed, and the matter is remanded to the juvenile court with directions to hold a hearing on C.C.'s petition.

FACTS

C.C. is the father of M.C., born in August of 2001, and K.C., born in July of 2003. C.C. and the girls' mother were involved in a relationship for three years, but separated in 2004. In the wake of that separation, the girls' mother filed for a restraining order against C.C., and the two were involved in an ongoing family court case involving issues of custody and visitation with their daughters.

From October of 2006 through January of 2007, C.C. enjoyed weekly court-ordered visitation with the girls, monitored by La Familia. La Familia reported that those visits were very positive, and always began with the girls smiling, and running to hug C.C. However, La Familia also reported that the visits were sometimes marred by the girls' mentioning negative comments their mother had made about C.C., such as that C.C. had "kicked their door." In that particular incident, C.C. had simply denied the claim, and changed the subject. On another occasion, one of the girls told C.C. that their mother had told them they "can't call [him] dad." C.C. responded, "Well, I'm your dad you have to call me dad."

At the end of January 2007, the family court modified the visitation order, allowing C.C. to have eight-hour visits every two weeks, and to take the girls away from the La Familia premises as long as his mother was also present. The court's order included an express finding that "the minor children are in no danger at this time."

After the girls' visit with C.C. on February 24, 2007, the girls' mother reported to La Familia that K.C. had told her C.C. had slapped her hand and that her knees were hurting. The mother also reported that C.C.'s mother had not been present for the visit, as she was required to be. There was additional visitation in March and April of 2007, but on April 28, the girls' mother did not show up. When the visitation monitor called her, she stated that she would not be coming, that "someone should have called you and told you," but would not say more. The monitor informed C.C. that the visitation had been canceled.

The dependency petition in this case was filed on April 19, 2007, just shortly before the mysteriously canceled visit. The petition stated that C.C.'s address was "unknown," and alleged that jurisdiction was appropriate because on April 7, 2007, C.C. had used excessive discipline by hitting both M.C. and K.C. on the hand, causing undue physical pain, and that he had also locked K.C. in a closet. It also alleged past incidents which had been the subject of prior referrals to the Orange County Social Services Agency (SSA), including: (1) that on an unspecified date in 2005, C.C. had kicked K.C.'s high chair, causing her to fall and be knocked unconscious; (2) that C.C. had a history of substance abuse, which included arrests and convictions on drug related charges; (3) that he has a history of engaging in excessive and inappropriate discipline with the girls' elder half-siblings, dating back to the 2001-2002 time period; (4) that C.C. had sexually abused the girls' elder half-sister in May of 2006, which placed M.C. and K.C. at risk of similar abuse; and that C.C. and the girls' mother had a history of domestic disputes and an "ongoing conflictual relationship, which on numerous occasions, has escalated into incidents of verbal and physical domestic violence . . . ."

The petition further alleged that C.C. had "threatened to kill" M.C. and K.C. if they disclosed to their mother the excessive discipline he engaged in, which caused the girls to suffer undue emotional distress. And finally, the petition alleged: (1) that the family has "a lengthy history of contact with [SSA], since at least April 3, 2000,"

and that prior services "have proven ineffective in resolving the family's needs, placing the children at risk for abuse and/or neglect and necessitating further intervention by the Juvenile Court;" and (2) that the girls' mother has been unable to protect them from C.C., "due to an existing custody order between the parents."

The court held its first hearing in the dependency case on April 20, 2007. At that hearing, the girls' mother reported she did not know C.C.'s current whereabouts or address, although she stated that La Familia might have contact information for him. She also identified one other woman, B.A., who might know how to reach him, but she could not provide any specific contact information for B.A. The mother then informed the court that C.C.'s family, apparently including brothers, sisters and parents, all lived in Mexico City, but that his mother had "passed away." She did not mention that C.C.'s supposedly deceased mother had been recently monitoring visitation between him and his daughters in Orange County. She could not provide any address for C.C.'s remaining family members in Mexico City.

The court ordered that the two girls be released to their mother, but considered in "detention" as to C.C. The court made a finding that visitation with C.C. would be "detrimental" for the girls, and ordered that none take place. The court issued a temporary restraining order barring C.C. from any contact with either the girls or their mother. The court scheduled a jurisdictional and disposition hearing to take place on May 15, 2007.

In connection with that May 15 hearing, SSA filed a declaration detailing the efforts to locate C.C. for purposes of notifying him of the pending proceeding. The document reflected searches of available data bases, and stated that notices had been sent to all possible addresses identified for C.C. The declarant concluded by stating "[a]s of this writing, I have not received a response from the subject, and I have exhausted all possible leads." Despite the inability to locate C.C., the court proceeded with the jurisdictional and dispositional matter. However, in lieu of any actual contested hearing,

the court issued its order based upon a stipulation reached between SSA and girls' mother.

The court's order included a determination that the allegations of the amended jurisdictional petition, stipulated to by the girls' mother, were true by a preponderance of the evidence. Among other things, the mother stipulated that C.C. had physically abused both daughters on April 7, 2007, that he threatened to kill them if they told their mother, and that he had abused K.C. in the past. She also stipulated that he had sexually abused her other daughter (half-sister to C.C.'s daughters) in the past; and that he tried to drown one of her sons and hit another with a baseball bat. She stipulated that C.C. had violated the court-ordered visitation plan by not having his own mother present and awake during visits, and that he had a history of domestic violence and drug abuse. And she stipulated that she could not protect M.C. and K.C. from C.C. due to an existing custody order.

On May 18, 2007, SSA requested that the court extend the temporary restraining order, because it had been unsuccessful in its efforts to locate C.C. for service of the first one. Apparently, La Familia had refused to provide contact information in connection with service of the restraining order, and other efforts to locate his specific unit number within the apartment complex where he was apparently living had proved unsuccessful. The court issued the order extending the restraining order.

Meanwhile, C.C. continued to appear at La Familia for regularly scheduled visitation with his daughters. He appeared on May 15 and 26, on June 9 and 23, and on July 7 and 14. However, because the girls' mother did not appear with them, no visitation occurred. C.C. could not contact the girls' mother directly, due to an existing restraining order, and his attorney in the family court case told him she had made several attempts to reach the attorney representing the girls' mother, with no success. The attorney told C.C. he would have to wait until the next scheduled court date to find out why the visitation had stopped.

Thus, C.C. apparently first became aware of the dependency proceeding in August of 2007, when he appeared in the family court for a hearing. He subsequently attempted to hire private counsel to represent him in the matter, but could not afford to do so. He made his first appearance in the dependency matter at the six-month review hearing on November 7, 2007, and the court appointed counsel to represent him on that date. C.C. objected on due process grounds to the lack of notice given to him, and the court indicated that it wanted the immediate focus to be on the issue of visitation only. The court then continued the six-month review hearing into December, and otherwise trailed the matter for one day, for the sole issue of allowing for an immediate contested hearing on visitation for C.C.

On that following day, the court reconvened the hearing and issued an order "renewing" its finding that the girls "are sufficiently fearful of father that it would be detrimental to the minors for the court to order visits with the father." However, the court assured C.C. he would be given an opportunity to raise any due process claims "at an appropriate time," and did issue an order requiring the girls to participate in therapy "to address the relationship with father and visitation issues."

The six-month review hearing was held on December 6, 2007. C.C. was present, along with his (apparently still alive) mother. C.C.'s counsel noted that she was maintaining her due process objections regarding the lack of notice given to C.C., and was not yet prepared to proceed with an evidentiary hearing in connection with the six-month review hearing. The court responded "And I just want to be clear, counsel. I would note your prior objections." Counsel specifically explained that C.C. intended to put forth a more comprehensive argument concerning the notice issues "in the form of something like a [section] 388," and that she wanted to notify all counsel informally of that intention. The court responded "sure" and "[t]hat's fine, counsel."

In March of 2008, C.C. and the girls' participated in a monitored visit with a therapist. The therapist reported that at the beginning of the visit, C.C. remained in the

car while the girls were brought inside with their mother. K.C. stated she "[did not] want to see [C.C.]" Her mother assured her everything would be alright, and left. After the mother left, K.C. asked the therapist whether C.C. would lock her in a closet. The therapist told her that she and M.C. would not be left alone with C.C., and showed her there were no closets into which she could be put. Thereafter, C.C. came into the room bearing Easter baskets. The girls shared Easter memories with C.C. as they looked through the baskets, and spoke with him about things their mother had told them. For example, K.C. said "[C.C.], I have to tell you something. My mom said I can't hug you because she said: remember he put you in the closet. You're not going to put me in the closet? My mom said so." C.C. merely responded "no" and changed the subject. He told the girls "mommy loves you and I love you too."

The therapist reported to the social worker that it was "obvious" that the girls were being coached by their mother. Without making any formal diagnosis of Parental Alienation Syndrome, the therapist believed there was an "alienation dynamic within the family." She believed it had affected M.C., the elder daughter, to a greater extent than it had K.C. The therapist also reported that C.C. "showed active parenting" and behaved appropriately with the girls. She believed that C.C. did not need monitored visits and would benefit from being monitored as a way of documenting his appropriateness as a father.

C.C.'s section 388 petition, filed on the same day the court held its second six-month review hearing in April of 2008, sought a change in the court's May 15, 2007 jurisdictional and dispositional orders. The petition alleged those original orders had been made in his absence, before he had been notified of the proceedings, and without appointment of counsel to represent him. C.C. asserted the factual basis for the orders, i.e., that he had physically abused and threatened his daughters, and sexually abused their half-sister, were untrue; he expressly denied the allegations and submitted additional evidence, including the opinion of the therapist who had interviewed the children and

concluded they were being "coached" by their mother, as well as witnesses who were present on the date he had allegedly committed the physical abuse, to support his denial. C.C. also submitted other evidence attesting to his current domestic stability and successful participation in services, and provided character references from people familiar with his life. Finally, C.C. submitted evidence suggesting that it was the girls' mother, and not he, who had been the primary cause of the family's troubles, and further suggesting that she had been engaged in a long campaign of lies, intimidation, and manipulation of the system, all designed to alienate his daughters from him.

The court denied the motion without an evidentiary hearing. Although its minute order states only that "court finds prima facie not found, motion for hearing as to 388 denied," the court's oral comments are somewhat more illuminating. It explained that C.C.'s petition "deals with the issue of notice and the request is the court vacate jurisdictional and dispositional findings, and then there is also a request that the court consider whether mother has – subjects the children to emotional harm as described by the [section] 300 (c) and if so, father requests placement."

The court noted that it was "concerned" about the issues raised in the petition, acknowledged that the newly discovered evidence (some of which was culled from SSA reports submitted to the court) was "interesting," and conceded that while it appeared that SSA had made reasonable efforts to locate C.C. when the jurisdictional petition was filed, the issue of whether he had received "actual notice" of the proceeding "subject to some ambiguity." Nonetheless, the court believed it was "clear" that C.C. had notice of the dependency action as of August 1, 2007, when he was informed about it by the family court. The court then noted that C.C.'s assertions regarding "the emotional impact on the children of these [dependency] proceedings," and the "accusations as to mother," were "subject to a contested hearing at the six-month review hearing." However, because C.C. "eschewed" the opportunity to substantively litigate those issues

at the six-month hearing, the court concluded the section 388 petition raising those issues was "not timely."

Despite the statement in the minute order that "prima facie not found," the court's oral statements do not indicate it ever reached the point of analyzing C.C.'s proffered evidence in terms of whether it presented a prima facie case for a change in the prior order.

I

Section 388, subdivision (a) provides in pertinent part as follows: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction."

Because "[a]ny order made by the [juvenile] court in the case of any person subject to its jurisdiction may at any time be changed, modified, or set aside, as the judge deems meet and proper, subject to such procedural requirements as are imposed by this article" (§ 385), there is no time limit for filing a section 388 petition within an ongoing dependency case.

Nor does a parent forfeit the right to pursue a section 388 petition merely because he or she has participated in proceedings. Instead, the only issues to be decided are whether the change in circumstance or new evidence offered would warrant a change

in a prior order, and whether the changed proposed is consistent with the child's best interests. (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 955.)

The timing of the petition does come into play in assessing the second of those issues. Clearly, there are circumstances which might warrant a change in a prior order if made at an early point in the proceedings, but which no longer would if raised much later – for instance, after a child had formed strong and loving bonds with a prospective adoptive family. In fact, the court in this case suggested that its reluctance to set a hearing was based in part upon "[c]onsiderations as to . . . stability, consistency, predictability, all those factors have moved along." And those are valid considerations to be sure, but only when addressed *as part of* the court's assessment of the petition's *merits*. They cannot be used as a means to avoid that consideration, as the court appeared to do here.

SSA nontheless argues the court was justified in rejecting the petition outright, because C.C.'s objections to the lack of notice given him were "forfeited" by his subsequent participation in the proceeding. However, the cases relied upon by SSA, *In re Gilberto M.* (1992) 6 Cal.App.4th 1194, and *In re P.A.* (2007) 155 Cal.App.4th 1197, are inapposite. In both of those cases, a father was attempting the very authority of the court to conduct dependency proceedings affecting his child, based solely upon the insufficiency of the notice to him – but only *after* having participated in hearings on the merits. The courts in those cases analogized to general civil law holding that a party's "general appearance" in a case, to participate on the merits, thereby acquiesces to the court's assertion of personal jurisdiction over him. (See Code Civ. Proc., § 410.50, subd. (a) ["A general appearance by a party is equivalent to personal service of summons on such party."].)

But the challenge in this case is different. What C.C. seeks is not a wholesale invalidation of all dependency proceedings to date, based solely on an alleged flaw in the service of notice upon him; instead, he seeks a reconsideration *on the merits*

of the court's jurisdictional and dispositional orders, based upon new evidence. The fact that he was not given notice when the proceedings commenced, and was consequently unable to be heard on the jurisdictional and dispositional issues initially, is simply part of the factual presentation suggesting the need for reconsideration of those issues now. Moreover, the fact that the original orders were actually made without any contested hearing, and were instead based on a stipulation by the mother *as to C.C.'s numerous bad acts*, simply enhances the appearance that an injustice may have occurred here.

As explained by this court in *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1757, "California's dependency scheme considered as a whole affords parents 'repeated' opportunities to challenge detriment findings to, among other things, diminish the risk of erroneous fact-finding." (Italics omitted, citing *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.) C.C. should not have been denied that opportunity here, merely because he failed to formally mount his challenge within the first month of his appearance in the case.

II

We next turn to the issue of whether C.C.'s petition made a prima facie showing that a change in the prior orders was warranted, and that such a change would be consistent with his daughters' best interests. Despite the terse statement in the juvenile court's minute order that "prima facie not found," there is no indication that the court actually considered C.C.'s petition on the merits at the hearing. Nonetheless, we have no problem concluding that the petition in this case met the standard, and that a hearing should have been held.

As explained by our Supreme Court in *In re Jasmon O.* (1994) 8 Cal.4th 398, 415 "The petition for modification must contain a 'concise statement of any change of circumstance or new evidence that requires changing the [previous] order,'" and "must be liberally construed in favor of its sufficiency." Moreover, "'[t]he parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing.

[Citation.]' (*In re Marilyn H. [(1993)]*5 Cal.4th 295, 310.) 'A "prima facie" showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited. [Citation.]' (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.)" (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 673.)

If the evidence supporting C.C.'s petition is assumed to be true, as it must be for purposes of determining a prima facie case, it would demonstrate that the mother of C.C.'s girls initiated this dependency proceeding – and then stipulated to *false allegations* that C.C. had engaged in a campaign of terrible conduct against both his daughters and their half-siblings – all as part of a manipulative scheme to drive C.C. out of the children's lives. It is difficult to see how that state of facts would not warrant at least a modification of the factual findings supporting the jurisdictional order, as well as a change in the dispositional order.

SSA makes an attempt to defend the court's decision, but in doing so applies an analytical standard that is simply inappropriate at this juncture of the proceedings. Rather than arguing C.C.'s petition did not state a prima facie case, SSA argues instead that the evidence submitted by C.C. is ultimately unpersuasive. For example, SSA argues that the conclusions of the therapist who opined that M.C. and K.C. had been "coached" by their mother, and were being subjected by her to an "alienation dynamic," were not worthy of belief because they amount to "sweeping conclusions based on [a] single observed visit and no testing or use of other evaluation tools could rightly be viewed with skepticism by the juvenile court."

However, whether the court might have been justifiably "skeptical" about some of the evidence submitted by C.C. is beside the point. The issue of whether that evidence was ultimately persuasive can be properly assessed only after *the hearing* on the section 388 petition. C.C. was entitled to that hearing, and we consequently reverse the court's order and remand the case to the juvenile court with directions to hold that hearing.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.